CHING SENG WOAH @ CHENG SONG HUAT

v.

LIM SHOOK LIN (F)

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
MAHADEV SHANKAR JCA
AHMAD FAIRUZ J
[CIVIL APPEAL NO: B-02-65-1995]
28 SEPTEMBER 1995

FAMILY LAW: *Marriage - Dissolution by consent - Prerequisites for making decree - Duty of trial Judge - Whether to ensure that proper provisions were made for wife and children - Proper provisions thereof - Whether must come from the parent's earning power - Law Reform (Marriage and Divorce) Act 1976 ss. 52, 57(1)(e), 76.*

FAMILY LAW: *Section 52 Law Reform (Marriage and Divorce) Act 1976 - Dissolution of marriage - Proper provisions for wife and children - Powers provided in Part VIII of Act - Whether additional to powers conferred by Parts VI and VII - Sections 57(1)(e), 92 & 95 - Proper effect.*

WORDS & PHRASES: *"Matrimonial assets".*

The wife in this case had petitioned for divorce on the grounds that the marriage had irretrievably broken down. In the petition she *inter alia* prayed for a dissolution of the marriage, a half share in the matrimonial home, a share of his EPF savings and maintenance for herself and for their two daughters. The husband, in his acknowledgement of service of the petition, agreed to the prayer on dissolution, but contested all the other prayers.

On 23 September 1993, a *decree nisi* was made by the Court pursuant to s. 52 Law Reform (Marriage and Divorce) Act 1976 (the Act), providing that the same would be made absolute within three months, and that "the trial with reference to the **division of the assets** between the petitioner and the respondent be adjourned to a date to be fixed". At the trial that followed, however, the husband only agreed to pay maintenance for his daughters. The Court, upon consideration of the respective monthly earnings of the husband and the wife, which stood at RM7,300 and RM1,300, and the provisions of the Act, nonetheless ordered that (i) the husband pay RM1,000 a month maintenance for both children, their medical bills, and their education up to tertiary first degree (ii) one-third of the value of the matrimonial home valued at RM175,000 be given to the wife (iii) there be no maintenance for the wife and (iv) one-third of the husband's EPF as at 31 December 1993 be paid to the wife.

The husband, dissatisfied with the order, appealed. Before the Court of Appeal, the husband argued (i) that the wife should not have been given any share whatsoever of the matrimonial home (ii) that as far as the EPF was concerned, only that part of it which had accrued from contributions made by him from his marriage up to the date of his separation should have been aggregated with the wife's EPF and a third of this figure fixed as her share of their combined EPF (iii) that maintenance for the daughters should have ceased upon their reaching the age of 18. The facts showed that after the husband left the matrimonial home, the wife had herself purchased a house in Subang Jaya. That being the case, the husband contends that he was also entitled to a share of this property.

Held:

Per Mahadev Shankar JCA (delivering the judgment of the Court):

[1] It was unfortunate that the hearing with regard to the division of assets between the petitioner and the respondent was postponed to a date to be fixed, because it is evident from the way things progressed afterwards that it escaped everybody's notice, that a decree on dissolution of mutual consent under s. 52 cannot be made unless the Court is "satisfied that both parties freely consent and that **proper** provision is made for the wife and for the support, care and custody of the children of the marrriage" and that the Court "may attach such conditions to the decree of divorce as it thinks fit".

[2] Since the appellant's answer to the question in the acknowledgement of service of the petition was a denial of all liability for any maintenence, the statutory prerequisite as to proper provision for the wife must first be taken care of before the *decree nisi* was made. This has not been done, and the result was that the focus shifted from "proper provision for the wife and children" to "what a fair division of the assets would be".

[3] Part VII of the Act is an inseparable adjunct of part VI because it contains the enabling provisions to give effect to the relief referred to in s. 57(1)(e). The priority, however, is not in s. 76 but s. 57(1)(e), and the first thing to achieve upon break-up is proper provision for the parties and the children. Rule 7(2) mandatorily requires Form 4 to be filed with the petition. *Inter alia* the Form requires the parties to state "any long term proposals for further education or training" of the children. In the present case the wife specifically requested for maintenance for her two daughters to be educated till the completion of their university education.

[4] The proper provision must come from the parent's earning power. The Court's power to order transfer or provide security for maintenance and to attach conditions to the decree, all point to one conclusion. Any division of the assets is a secondary exercise which affects only the residue which is left over after proper provision has been made.

[5] During the subsistence of a marriage, the expression "matrimonial assets" refers to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole. It matters not whether the asset is acquired solely by the one party or the other or by their joint effort. Further, such assets could be capital assets and therefore, the earning power of each spouse is also an asset.

[6] The husband, having undertaken in the Court below to maintain his two daughters till they got their first degree, cannot reprobate what he has approbated. In any case, the powers provided for the protection of children by Part VIII of our Act are additional to and not restrictive of the powers contained in Part VI and VII. Part VIII, and s. 95 in particular, has to be viewed in the context of a child who is not simultaneously faced with a break-up of the family homestead. The parental duties in this context are spelt out by s. 92 and it extends to accomodation, clothing, food and education. In the event, the Court in the instant case can direct the husband to provide for his daughters till their tertiary degree.

[7] The question of proper provision under s. 52 of the Act and the powers of property division under s. 76 (as opposed to providing maintenance simpliciter) could involve transfers of property not just for the benefit of the spouses *inter se* but also for the benefit of dependent children.

[8] At the time of the decree nisi the elder daughter was just over 16½ years while the younger just over 13½. They had rights which had to be, and must have been taken into account by the trial Judge when she apportioned the assets as she did.

[9] The documentary evidence at the trial consisted of the wife's Income Tax statement and phone bills she paid, the husband's EPF statement and pay-slip and a valuation report of the house. There were large gaps in the oral testimony resulting in the trial Judge having to work with imprecise material. Left thus to do her best with such material, the trial Judge had adopted the broad approach and made her orders accordingly.

[10] The husband must pay RM500 per month to each of his daughters and all their educational expenses until each of them has obtained their first university degree and also their medical bills. If the sum of RM58,333 has not already been paid to the wife, the Senior Assistant Registrar of the High Court shall have the house sold by private treaty or public auction and the wife be paid that amount. And a further RM86,875 shall be paid to her out of the husband's EPF.

Per Curiam:

The powers of the trial Judge to make absolute the *decree nisi* long after orders therefor were made may not be questioned. But the practice of postponing proper provision and division of assets is not a healthy one because it can obscure the real obligations of the parties and distort the fair weightage to be given where the division of assets is being used to off-set the periodical payments required for proper maintenance.

Per Curiam:

Upon a careful reappraisal of all the material put before the learned trial Judge, we must place upon record our dissappointment at how the husband viewed his financial obligations to his wife and daughters. Had there been a cross-appeal we would have provided a reasonable amount for her maintenance or an increased share of the matrimonial home or both.

[Appeal dismissed. Order accordingly.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG KELUARGA: *Perkahwinan - Pembubaran melalui persetujuan - Syarat-syarat duluan bagi membuat dekri - Tugas Hakim perbicaraan - Samada harus memastikan bahawa peruntukan yang wajar dibuat bagi isteri dan anak-anak - Peruntukan wajar - Samada harus bersandar kepada keupayaan pendapatan ibu-bapa - Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 ss. 52, 57(1)(e), 76.*

UNDANG-UNDANG KELUARGA: *Seksyen 52 Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 - Pembubaran perkahwinan - Peruntukan wajar untuk isteri dan anak - Kuasa yang diberi oleh Bahagian VIII Akta - Samada tambahan kepada kuasa di bawah Bahagian VI dan VII - Seksyen-seksyen 57(1)(e), 92 & 95 - Kesan wajar.*

PERKATAAN & ISTILAH: *"Aset-aset suami-isteri.*

Si isteri dalam kes ini telah membuat petisyen bagi mendapatkan perceraian atas alasan bahawa perkahwinannya telah lerai dengan cara yang tidak boleh dipulihkan lagi. Dalam petisyen itu beliau telah antara lainnya memohon untuk mendapatkan satu pembubaran akan perkahwinan itu, setengah bahagian bagi rumah suami-isteri, satu bahagian dari simpanan KWSP suaminya dan penyaraan bagi dirinya sendiri dan untuk kedua-dua anak perempuan mereka. Suami, dalam akuan terima penyampaian petisyen itu, bersetuju kepada pohonan untuk pembubaran, tetapi mempertikaikan kesemua pohonan yang lain.

Pada 23 September 1993, satu dekri nisi telah dibuat oleh Mahkamah dibawah dengan s. 52 Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 (Akta), sambil memperuntukkan bahawa perkara yang sama akan dijadikan mutlak dalam tempoh tiga bulan, dan bahawa "perbicaraan yang merujuk kepada pembahagian aset-aset antara pempetisyen dan responden hendaklah di tangguhkan kepada satu tarikh yang akan di tetapkan". Pada perbicaraan berkenaan, suami bagaimanapun bersetuju untuk membayar saraan bagi anak-anak perempuannya. Setelah menimbangkan pendapatan bulanan suami dan isteri masing-masingnya, yang berjumlah sebanyak RM7,300 dan RM1,300, serta juga peruntukan-peruntukan Akta, Mahkamah telah memerintahkan bahawa (i) suami hendaklah membayar RM1,000 sebulan sebagai saraan bagi kedua-dua anak, bil perubatan mereka dan pendidikan mereka sehingga mendapat ijazah pengajian tinggi yang pertama (ii) satu pertiga daripada nilai rumah suami-isteri yang dinilai sebanyak RM175,000 hendaklah diberikan kepada isteri (iii) tidak akan ada apa-apa nafkah bagi isteri dan (iv) satu pertiga daripada simpanan KWSP suami sepertimana pada 31 Disember 1993 hendaklah dibayar kepada isteri.

Suami, yang tidak berpuashati dengan perintah di atas, telah merayu. Di hadapan Mahkamah Rayuan, suami telah berhujah (i) bahawa isteri tidak seharusnya diberikan apa-apa bahagian sekalipun dari rumah suami-isteri (ii) bahawa sejauhmana ianya berkaitan dengan simpanan KWSP, hanya sebahagian daripadanya yang telah terakru daripada sumbangan-sumbangan yang telah dibuat oleh beliau daripada perkahwinannya sehingga kepada tarikh perpisahan beliau seharusnya dijumlahkan dengan simpanan KWSP isteri dan satu pertiga daripada angka ini ditetapkan sebagai bahagiannya daripada simpanan KWSP yang disatukan (iii) bahawa saraan bagi anak-anak perempuannya seharusnya diberhentikan setelah mereka mencapai umur 18 tahun. Fakta-fakta menunjukkan bahawa selepas suami meninggalkan rumah suami-isteri, si isteri telah membeli sebuah rumah di Subang Jaya. Dalam keadaan ini, suami menegaskan bahawa beliau juga berhak kepada sebahagian daripada harta ini.

Diputuskan:

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

[1] Agak malang bahawa perbicaraan berhubung dengan pembahagian aset antara pempetisyen dan responden telah ditangguhkan kepada satu tarikh yang akan ditetapkan, kerana ianya jelas daripada keadaan yang berlaku selepas itu bahawa ianya terlepas daripada perhatian setiap orang, bahawa sesuatu dekri mengenai pembubaran persetujuan bersama di bawah s. 52 tidak boleh dibuat kecuali Mahkamah "berpuashati bahawa kedua-dua pihak dengan rela hati bersetuju dan bahawa peruntukan "yang wajar" dibuat bagi isteri dan untuk tanggungan, penjagaan serta pemeliharaan anak-anak daripada perkahwinan itu" dan bahawa Mahkamah "boleh mengenakan syarat-syarat yang sedemikian kepada dekri perceraian sepertimana ianya fikirkan sesuai".

[2] Oleh kerana jawapan perayu kepada persoalan dalam akaun terima penyampaian petisyen itu adalah suatu penafian akan kesemua tanggungan untuk apa-apa saraan, syarat duluan berkanun berhubung dengan peruntukan wajar bagi si isteri haruslah dilaksanakan terlebih dahulu sebelum dekri nisi itu boleh dibuat. Perkara ini telah tidak dilakukan, dan keputusannya adalah bahawa fokus telah berpindah daripada "peruntukan wajar bagi isteri dan anak-anak" kepada apakah pembahagian yang adil terhadap aset-aset itu sebenarnya.

[3] Bahagian VII Akta tersebut adalah suatu tambahan bahagian VI yang tidak boleh diasingkan kerana ianya mengandungi peruntukan-peruntukan yang membolehkan penguatkuasaan relief yang dirujuk dalam s. 57(1)(e). Keutamaan walaubagaimanapun, bukannya dalam s. 76 tetapi s. 57(1)(e), dan perkara utama untuk dicapai setelah berpisah adalah peruntukan wajar bagi pihak-pihak yang terlibat dan anak-anak. Kaedah 7(2) secara mandatori menghendaki supaya Borang 4 difailkan dengan petisyen. Antara lainnya, Borang itu menghendaki supaya pihak-pihak yang berkenaan menyatakan apa-apa cadangan jangka panjang untuk melanjutkan pelajaran atau latihan anak-anak. Dalam kes semasa ini, si isteri secara khususnya meminta saraan bagi kedua-dua anak perempuannya supaya diberikan pendidikan sehingga tamatnya pendidikan diperingkat universiti.

[4] Peruntukan yang wajar mestilah datang daripada keupayaan pendapatan ibu-bapa. Kuasa Mahkamah untuk memerintahkan pemindahan atau memberikan jaminan bagi saraan dan mengenakan syarat-syarat kepada dekri kesemuanya membawa kepada satu kesimpulan. Apa-apa

pembahagian akan aset-aset adalah suatu pelaksanaan sekunder yang mana hanya menjejaskan saki-baki yang tertinggal selepas peruntukan yang wajar telah dibuat.

[5] Dalam tempoh perkahwinan, ungkapan aset-aset suami-isteri merujuk kepada rumah suami-isteri dan kesemua yang diletakkan di dalamnya oleh mana-mana satu pasangan dengan niat bahawa rumah mereka serta barangan yang berkaitan seharusnya merupakan sumber yang berterusan untuk kedua-dua pasangan dan anak-anak mereka, untuk diguna secara bersesama dan secara berasingan bagi kepentingan keluarga secara menyeluruh. Ianya tidak perlu dihiraukan samada aset tersebut diperolehi semata-mata oleh satu pihak atau oleh pihak yang lain atau melalui usaha mereka bersama. Selanjutnya aset-aset tersebut seharusnya merupakan aset-aset utama dan dengan itu, keupayaan pendapatan setiap seorang dari pasangan itu adalah juga merupakan suatu aset.

[6] Si suami, setelah mengakujanji dalam Mahkamah di bawah untuk menyara kedua-dua anak perempuannya sehingga mereka mendapat ijazah mereka yang pertama, tidak boleh membelakangi apa yang telah diperakukannya. Dalam apa keadaan pun, kuasa-kuasa yang diperuntukkan bagi perlindungan anak-anak oleh Bahagian VIII Akta kami adalah tambahan kepada dan bukannya menghad kuasa-kuasa yang terkandung di dalam Bahagian VI dan VII. Bahagian VIII, dan s. 95 khususnya, haruslah dipandang menurut konteks seseorang kanak-kanak yang tidak secara serentak berhadapan dengan suatu perpisahan keluarga. Kewajipan ibu-bapa dalam konteks ini dibentangkan oleh s. 92 dan ianya berlanjutan kepada penginapan, pakaian, makanan dan pendidikan. Dalam keadaan itu, Mahkamah dalam kes semasa ini boleh mengarahkan si suami untuk menyara anak-anak perempuannya sehingga mereka memperolehi ijazah pengajian tinggi.

[7] Persoalan peruntukan yang wajar di bawah s. 52 Akta itu dan kuasa-kuasa pembahagian harta di bawah s. 76 (bertentangan dengan memberikan nafkah simpliciter) boleh melibatkan pemindahan harta bukan sahaja untuk kepentingan kedua-dua pasangan inter se tetapi juga untuk kepentingan anak-anak secara bebas.

[8] Pada waktu dekri nisi, anak perempuan yang tua hanya berumur 16½ tahun sedangkan adiknya baru 13½ tahun. Mereka mempunyai hak yang harus, dan mesti diambil perhatian oleh Hakim perbicaraan apabila beliau membahagikan aset-aset sepertimana yang telah dilakukan olehnya.

[9] Keterangan dokumentari di perbicaraan terdiri daripada penyata Cukai Pendapatan si isteri dan bil-bil telefon yang telah dibayar olehnya, penyata KWSP suami dan penyata gaji dan satu laporan penilaian bagi rumah

tersebut. Terdapat ketidakpastian yang meluas dalam testimoni lisan yang mana mengakibatkan Hakim perbicaraan terpaksa bekerja dengan bahan-bahan yang agak tidak tepat. Oleh kerana disogokkan sedemikian rupa dengan bahan-bahan yang tidak mencukupi, Hakim perbicaraan telah menerima-pakai pendekatan yang luas dan membuat perintah yang sekadar dengannya.

[10] Si suami mesti membayar RM500 sebulan kepada setiap seorang anak perempuannya dan kesemua perbelanjaan pendidikan mereka sehingga setiap seorang daripada mereka mendapat ijazah universiti yang pertama dan juga bil-bil perubatan mereka. Jika jumlah sebanyak RM58,333 masih belum dibayar kepada si isteri, Penolong Kanan Pendaftar Mahkamah Tinggi akan berusaha untuk menjual rumah itu melalui triti persendirian atau perlelongan awam dan si isteri dibayar jumlah itu. Dan jumlah yang selanjutnya iaitu RM86,875 hendaklah dibayar kepada beliau melalui KWSP si suami.

Per Curiam

Kuasa-kuasa Hakim perbicaraan untuk menjadikan mutlak dekri nisi lama selepas perintah-perintah baginya dibuat mungkin tidak akan dipersoalkan. Tetapi amalan menundakan peruntukan dan pembahagian yang wajar akan aset-aset bukannya merupakan suatu amalan yang sihat kerana ianya boleh menyelubungi kewajipan-kewajipan sebenar pihak-pihak yang berkenaan dan mencacatkan penimbangan adil yang seharusnya diberikan di mana pembahagian aset-aset dipergunakan untuk menolak bayaran-bayaran berkala yang diperlukan untuk penyaraan yang sempurna.

Per Curiam:

Setelah menilaikan semula dengan teliti kesemua bahan-bahan yang dikemukakan di hadapan Hakim perbicaraan, kami harus mencatatkan kekecewaan kami terhadap bagaimana si suami memandang kewajipan kewangan beliau terhadap isteri dan anak-anak perempuannya. Sekiranya terdapat rayuan balas kami tentu sekali telah memperuntukan satu jumlah yang wajar bagi nafkah beliau atau satu bahagian yang lebih besar dari rumah suami isteri tersebut atau pun kedua-duanya.

[Rayuan ditolak. Perintah sekadarnya.]

Cases referred to:
Kulasingam v. Rosammah [1981] 2 MLJ 36 ***(cit)***
National Provicial Bank Ltd. v. Ainsworth [1965] AC 1981 ***(refd)***
Lim Tiang Hock Vincent v. Lee Siew Kim Virginia [1991] 1 MLJ 247 ***(refd)***
Tan Kim Hong v. Keng Heng Investment Pte. Ltd. [1991] 1 MLJ 399 ***(refd)***
Shirley Koo v. Kenneth Mok Kong Chua [1989] 2 MLJ 264 ***(foll)***

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, rr. 24, 25
Children's Act 1989 (U.K), s. 17, 95
Law Reform (Marriage and Divorce) Act 1976, s. 52
Married Women and Children (Maintenance) Ordinance 1950
Rules of the High Court, O. 24 r. 12, O. 26 r. 1
Women's Charter, s. 106

Other sources referred to:
Bromley Family Law, 8th Edn., p. 643

For the appellant - Balwant Sidhu Singh; M/s. Balwant Singh Sidhu & Co.
For the respondent - Ng Choong Meng; M/s. Ng Choong Meng & Co.

JUDGMENT

Mahadev Shankar JCA:

The appellant (the husband) married the respondent (the wife) in 1976 according to Chinese rites. He was then a reporter with the New Straits Times Group attached to the Berita Harian. She was a telephone operator in Nanyang Siang Pau. He was a divorcee with two sons from his first marriage. They were then aged 6 and 5 years respectively. He was then 34 years old. She was 28.

The parties then cohabited with his mother at 24, Jalan 20/7, Petaling Jaya, his two sons, his brother and his brother's wife. A daughter was born to them in February 1977. In November that year the husband and wife went through a Civil Marriage at the Marriage Registry in Petaling Jaya. In February 1980 they had a second daughter.

In 1982 the husband, wife and two daughters moved to the ground floor of No. 8, Jalan 20/7, Petaling Jaya. The upstairs which had a separate entrance was then occupied by a tenant. At or about the time the couple moved in with their two daughters the mother transferred her half share in that house to the husband who thus became its sole owner. This house became the matrimonial home.

In 1989 the mother died. The two sons, now 19 and 18 respectively came to live in the matrimonial home. The marriage came under strain later that year. In early 1990, the tenant moved out. The husband and his two sons moved upstairs. The wife remained with her two daughters downstairs. Thereafter the husband ceased to pay maintenance.

So the wife commenced proceedings which eventually ended with an order on 26 August 1991 in the Magistrate's Court that he pay RM900 per month for his wife and two daughters. She filed a unilateral petition for divorce in

October 1992 based on their having lived apart for more than two years. The husband contested all her prayers except one namely that the marriage be dissolved.

On 23 September 1993, a *decree nisi* was made by mutual consent under s. 52 of the Law Reform (Marriage and Divorce) Act 1976 (the Act), providing that unless sufficient cause was shown to the Court within three months from the making thereof decree be made absolute and that "the trial with reference to the division of the assets between the petitioner and the respondent be adjourned to a date to be fixed."

Long after the three months had lapsed the trial was held on 7 April, 30 June and 8 August 1994, when the husband and wife gave evidence and were cross-examined. Final submissions followed on 26 September 1994. The trial Judge reserved judgment. On 21 November 1994 she directed that:

(i) the husband pay, RM1,000 per month for both children, their medical bills, and their education up to tertiary first degree;

(ii) one-third of the value of the matrimonial home valued at RM175,000 be given to the wife;

(iii) no monthly payments be made as maintenance to the wife;

(iv) one-third of the husband's EPF as at 31 December 1993 (RM260,627.06) be paid to the wife as and when it is paid to the husband according to law.

Against this the husband has appealed to us. He sought to urge upon us that the Judge should not have ordered any maintenance at all for each of the two daughters beyond their eighteenth birthday, that the wife should not have been given any share whatsoever of the matrimonial home and that as far as the EPF was concerned, only that part of the husband's EPF which had accrued from contributions made by him from his marriage up to the date of his separation should have been aggregated with the wife's EPF and a third of this figure fixed as her share of their combined EPF.

This line of argument, which is not without some ingenuity, raises important issues which have to be dealt with in some depth.

Procedures for pre-trial discovery are provided by rr. 24 and 25 of the Divorce and Matrimonial Proceedings Rules 1980 (the Rules) which makes the RHC O. 24 r. 12 (discovery and inspection of documents) and O. 26 r. 1 (discovery by interrogatories) applicable to defended causes begun by petition. No use was made of them in the Court below or of r. 62 which provides for the manner in which evidence is to be adduced on applications for property division. The documentary evidence at the trial consisted of the Wife's Income Tax statement and phone bills she paid, the husband's EPF statement and pay-slip

and a valuation report of the house. There were large gaps in the oral testimony resulting in the trial Judge having to work with imprecise material.

In August 1994 the husband was earning RM7,300 per month. He chose to give his occupation as a "journalist" when in fact he was the General Manager cum Editor-in-Chief of the Shin Min Daily News. He claimed that he earned no bonus or gratuity, and gave no details of any other allowances. He disclosed in cross-examination that in September 1993 (i.e. about the time the *decree nisi* was made), he withdrew RM106,000 from his EPF leaving a balance as at 31 December 1993 of RM260,627.06. But he gave no details as to why he withdrew this large sum or what he spent it on. His evidence on the shares he had bought and sold was very sketchy and riddled with amnesia.

From 1976 when the husband claimed to be a reporter he progressed up the ladder to Chief Reporter, then News Editor and Deputy News Editor. By 1987 he became Editor of Shin Min Daily News and in 1988 General Manager cum Editor. He gave no details at all about the increases in his salary and allowance which must have kept pace with the rise in his career prospects.

The wife's position in April 1994 was still that of a telephone operator but now getting RM1,300 all in. Her EPF contributions now stood at "around RM40,000". She was equally vague about her losses on the stock market.

The Matrimonial Home

The husband says this house was purchased in 1972 for RM29,000. He claims his mother advanced 30% down payment (say RM9,800). There is no evidence as to where she got this money. 70% was borrowed from the Malaya Borneo Building Society repayable over 15 years and the rent from the tenant was used to help pay the mortgage instalments. He gave no evidence as to the amount. After he became sole owner in 1982 he says he continued to pay the instalments. He does not say when the loan was fully paid up but it would be fair to infer that this was sometime in 1987 or 1988.

The wife caveated the property in 1992 but was unable to sustain it. The proceedings before conciliation tribunal were then going on. The husband successfully challenged the caveat and got an order for its removal with costs.

The Respective Contributions of the Parties to the Marriage

Compared with the wife's salary the husband's earnings were substantial but when it came to looking after the household, he gave his wife only RM100 per month initially. After the birth of her first daughter this rose somewhat. After the second daughter the allowance went up to RM320 per month. By 1987 it was raised to RM450 per month. The baby-sitter engaged to look after

the daughters during their infancy alone cost RM310 per month. These figures were not seriously challenged by the husband. Nor did the husband condescend to give particulars as to what he spent the rest of his money on.

The wife's evidence was that her entire salary was swallowed up in looking after the household, feeding and clothing herself and the girls and maintaining and educating them. In addition, apart from trading-in an old furniture set left by the husband's brother, she furnished the matrimonial home with her funds, even got in a piano, and also paid the electricity and phone bills. Since there was no maid it can be inferred that she also maintained the house by keeping the place clean and in a habitable condition. In cross-examination the wife said that during the marriage the husband had hinted to her that when he died the house would be divided equally between her and his two sons. She was not challenged on this point in cross-examination but in his evidence the husband denied this.

The Conduct of the Parties

Despite his own parsimony, the husband prevailed upon his wife to lend him money which she did by obtaining money from her brother and digging into her savings. By 1989 she began to suspect that the husband was having an affair with a female colleague. His two boys now 18 and 19 were also in the house. She persisted in demanding the return of the borrowed moneys and he repaid a sum of RM30,000 of which RM15,000 belonged to her brother.

After the husband moved upstairs in 1990 with his two sons, the parties lived separate lives. The elder son became a law graduate and the second son went to the United States in 1990 to study hotel management.

After commencing legal proceedings, the wife decided to get a house of her own. She used part of the loan money the husband returned, part of her EPF and took a bank loan for RM50,000 to buy herself a house in Subang Jaya for RM92,000. This house she rented out for RM650 per month. The rent was used to service the loan.

The Petition, the Answer and the Trial

In her petition the wife stated that the marriage had irretrievably broken down and the parties had lived apart since 1989 i.e. for more than two years. She gave such details of the husband's occupation, his assets and other corresponding earnings as she could guess at and prayed for a dissolution of the marriage, a half share in the matrimonial home which she valued at RM180,000 and for a lump sum payment of RM50,000 in addition to a share of his EPF and maintenance of RM500 per month for herself and RM700 for the children until they completed their university degree.

The answer filed by the husband on 20 April 1993 was almost a bare denial. He gave no details of his assets, emoluments or prospects. He only agreed that the marriage be dissolved and denied all liability for maintenance and financial provisions to his wife and daughters. To the question in the acknowledgement of service of the petition "In the event of *decree nisi* being granted on the basis of two years separation, do you intend to appeal to the Court for it to consider your financial position as it will be after the divorce?", his answer was "Tidak". The petition came on for hearing on 23 September 1993.

In retrospect we think that it was unfortunate that the hearing with regard to the division of assets between the petitioner and the respondent was postponed to a date to be fixed because it is evident from the way things progressed afterwards that it escaped everybody's notice that a decree on dissolution of mutual consent under s. 52 cannot be made unless the Court is "satisfied that both parties freely consent and that **proper** provision is made for the wife and for the support, care and custody of the children of the marriage" and that the Court "may attach such conditions to the decree of divorce as it thinks fit". Since the answer denied all liability for any maintenance or provision for the wife or the children, the statutory prerequisite as to proper provision had not been taken care of before this *decree nisi* was made.

Had this been taken into account before *decree nisi* was made, all parties would have been left in no doubt as to what the priorities were. As it turned out the focus shifted from "proper provision for the wife and children" to what a fair division of the assets would be.

At the trial, contrary to his answer totally denying any liability for maintenance for his wife or children, the husband agreed in his evidence in chief to pay maintenance to his two daughters and support their education until they got their first degree. In his final submission the husband's Counsel challenged the wife's right to one-half share in the matrimonial home and her right to any maintenance at all since she earned RM1,300 per month and he had now offered to take on the burden of the maintenance and education of his two daughters.

Should the Maintenance for the daughters have ceased upon their reaching 18?

This is the first issue and it turns on s. 95 of the Act which reads:

> 95. Duration of orders for custody and maintenance.
>
> Except where an order for custody or maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded,

> it shall expire on the attainment by the child of the age of eighteen years or where the child is under physical or mental diability on the ceasing of such disability, which is the later.

Mr. Sidhu contends that this means that unless the exceptions apply, all orders for custody or maintenance shall expire on the attainment by the child of the age of eighteen years. The exceptions are where the order itself specifically is for a shorter period, or the child is under physical or mental disability.

When parents divorce the children suffer the most. If Mr. Sidhu is right every able bodied child of 18 can be turfed out into the streets with impunity! Not only can they not look to their parents thereafter for money but also by inference for shelter in the matrimonial home! Section 95 could thus become the Boh Sia's charter.

In the narrow context of this case this submission is somewhat startling because it comes from a husband who in the Court below undertook on oath and with the benefit of legal advice to maintain his daughters till they got their first degree i.e. till they were educationally equipped to find their rightful place on the job market. It is a fundamental doctrine of law that a person cannot be permitted to reprobate what he has approbated. We therefore reject this submission.

As to its wider implications our view is that the powers provided for the protection of children by Part VIII of our Act are additional to and not restrictive of the powers contained in Part VI and VII. Part VIII and s. 95 in particular has to be viewed in the context of a child who is not simultaneously faced with the break-up of the family homestead. The parental duties in this context are spelt out by s. 92 and it extends to accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

Here the two boys are both enjoying a tertiary education; and the issue is whether the Court can direct the husband to provide for his daughters till their tertiary degree, even if he had not undertaken to do so. The Court's powers under s. 52 are very wide and transcend the limitations contained in s. 95, because s. 52 operates in a situation where the family is being legally disintegrated.

Mr. Sidhu did not canvas what the words "physical or mental disability" in s. 95 meant. An 18 year old computer whiz-kid who is a wheel chair case and therefore well able to earn a living at that age could here be contrasted with another 18 year old who is physically and mentally fit but is otherwise totally unable to fend for himself on the job market. In the present case we have no evidence of the accomplishments of the two daughters. However we must take note that unlike the United Kingdom and many other European

countries, Malaysia is not a welfare state. Whilst the married women's claim to a share of the matrimonial assets is now entrenched in our laws, the rights of the dependent young persons in these assets is yet to receive proper articulation. *Kulasingam v. Rosammah* [1981] 2 MLJ 36 was not cited to us, but that 20 year old daughter was claiming under the Married Women and Children (Maintenance) Ordinance 1950. Notwithstanding the definition of disability, under s. 17 of the English Children's Act 1989 (also not cited to us but see Bromley Family Law 8th Edn., p. 643) we are inclined to the view that in appropriate cases involuntary financial dependence is a physical disability under s. 95 of the Act. There are far reaching social implications here and we would prefer to say no more now as to whether English attitudes are suitable to Malaysian conditions in such a case or its corollary which is the duty to aged and dependent parents by their progeny. We would however reiterate that the question of proper provision under s. 52 of the Act and the powers of property division under s. 76 (as opposed to providing maintenance simpliciter) could involve transfers of property not just for the benefit of the spouses *inter se* but also for the benefit of the dependent children.

At the time of the *decree nisi* the elder daughter was just over 16½ years and the younger just over 13½ years. They had rights which had to be, and must have been taken into account by the trial Judge when she apportioned the assets as she did. Had either parent refused to maintain them, the Court would have had to consider what independent right they had against the parental assets to secure their position (see s. 79 of the Act).

The Wife's Rights

Now Part VI of the Act deals with "Divorce" and its opening section reads:

> 47. Principles of law to be applied.
>
> Subject to the provisions contained in this part, the Court shall in all suits and proceedings hereunder act and give relief on principles which in the opinion of the Court are, as nearly as may be, conformable to the principles on which the High Court of justice in England acts and gives relief in matrimonial proceedings.

Part VII deals with "Matters Incidental to Matrimonial Proceedings" and s. 76 is headed "Power for Court to order division of matrimonial assets". The trial Judge held that s. 47 did not apply to Part VII because the words "in all suits and proceedings hereunder" in s. 47 made English principles applicable only in suits and proceedings for divorce, judicial separation and nullity brought under Part VI.

But s. 52 reads:

> 52. Dissolution by mutual consent.

> If husband and wife mutually agree that their marriage should be dissolved they may after the expiration of two years from the date of their marriage present a joint petition accordingly and the Court may, if thinks fit, make a decree of divorce on being satisfied that both parties freely consent and that proper provision is made for the wife and for the support, care and custody of the children, if any, of the marriage, and may attach such conditions to the decree of divorce as it thinks fit.

And s. 57(1)(e) provides that:

> (1) Every petition for divorce shall contain:
>
> (e) the terms of any agreement regarding maintenance of the wife or dependant party and the children if any of the marriage, or the division of any assets acquired through the joint efforts of the parties or the sole effort one party; or where no such agreement has been reached, the petitioner's proposals;

Part VII is thus an inseparable adjunct of Part VI because it contains the enabling provisions to give effect to the relief referred to in s. 57(1)(e).

The primary objective however is spelt out in s. 52. Mr. Sidhu contends that the house is not a matrimonial asset because it was bought by the husband with his mother years before the marriage. He says merely because the wife bought all the furniture in the house that does not make it a matrimonial asset, because they are not fixtures and she can carry them away to her house in Subang Jaya. He referred us to *National Provicial Bank Ltd. v. Ainsworth* [1965] AC 1981 and indeed the whole of Chapter 8 of "Matrimonial Law in Malaysia and Singapore" (1994 edition) by Tan Chen Han and contended that once the decree was made absolute the wife (and presumably the two daughters) would have to leave the matrimonial home.

The Act does not define what matrimonial assets are. We think that during the subsistence of a marriage the expression refers to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole. It matters not in this context whether the asset is acquired solely by the one party or the other or by their joint efforts. Whilst the marriage subsists these assets are matrimonial assets. Such assets could be capital assets. The earning power of each spouse is also an asset.

Two points should now be made. The first is that whilst s. 47 refers to English principles we should always keep in the forefront of our minds that when the Act was first initiated we were breaking new ground. It was then necessary to look to English case law because we had adopted much of the wording of the corresponding English statute. In the two decades which have since passed

we have injected enough local experience into the application of the provisions of Part VI of the Act to become acutely aware that the differences between social and cultural aspirations with regard to marriage, divorce and welfare in England and Malaysia are such that much caution is called for before we adopt modem English attitudes. The measures we should take today to preserve the integrity of the Malaysian family when it is threatened by the calamity of divorce must be determined in the light of the Malaysian conditions. At best therefore the English reports should only be regarded as being of persuasive value or as case studies why the family as unit is progressively disintegrating in that country where one parent households and unmarried mothers now number at least three out of ten.

The second point which must be emphasised is that the priority is not in s. 76 but s. 57(1)(e) and the first thing to achieve upon break-up is proper provision for the parties and the children. Rule 7(2) mandatorily requires Form 4 to be filed with the petition. *Inter alia* the Form requires the parties to state "any long term proposals for further education or training" of the children. In the present case the wife specifically requested maintenance for her two daughters to be educated till the completion of their university education.

The proper provision must come from the parent's earning power or from the capital assets. The Court's power to order transfer or provide security for maintenance and to attach conditions to the decree, all point to one conclusion. Any division of the assets is a secondary exercise which affects only the residue which is left over after proper provision has been made.

We are mindful of the decisions in *Lim Tiang Hock Vincent v. Lee Siew Kim Virginia* [1991] 1 MLJ 247 and *Tan Kim Hong v. Keng Heng Investment Pte. Ltd.* [1991] 1 MLJ 399 both of which turned on the legal necessity of dividing the assets "**when** granting the decree of divorce" and the problems likely to arise if the divorce is completed without an order being made under s. 76 which is the equivalent of s. 106 of the Women's Charter. We have since established that the *decree nisi* here was not made absolute until 5 May 1995, long after the orders made by the trial Judge. Her powers to do so were not questioned. But the practice of postponing proper provision and division of assets is not a healthy one because it can obscure the real obligations of the parties and distort the fair weightage to be given where the division of assets is being used to off-set the periodical payments required for proper maintenance.

Maintenance for the Wife

Having held that s. 47 does not apply to s. 76, the learned Judge proceeded to hold that the wife should receive no maintenance at all. She arrived at this conclusion by holding that there was no evidence that the blame for the

breakdown could be more heavily apportioned to one party as opposed to the other and therefore looked solely at the "means and needs" of the wife. Having already directed the husband to pay RM1,000 per month for the children she held that the wife's earning of RM1,300 per month was quite enough even though the move to her house in Subang Jaya would deprive her of the rent of RM650 per month from that house. Some simple arithmetic would indicate otherwise. At the time of the decree the wife owed the bank RM50,000 being the balance of the loan. At 10% per annum, it would require about RM400 per month to service the interest alone. We will assume that the RM650 per month rent was enough to repay capital and interest on a term loan basis. So if she moved into the new house, she would effectively be left with RM650 after paying the monthly instalments towards the loan. Out of this RM650 she would have to pay her EPF which at say 10% would be RM130 and also her income tax which would be say RM50 per month. Consequently for her food, clothings and travelling she would be left with RM470. It is very hard to see how RM1,300 was enough in such circumstances.

Matrimonial Home

The husband was earning about RM7,300 per month. Having paid RM1,000 to the two daughters, he was still left with RM6,300. His two sons from the previous marriage were both adults. But allowing RM2,000 for the completion of their tertiary education, he was left with RM4,300 income per month for his commitments. The disparity is cause for disquiet.

Counsel for the husband submits that the buying of furniture and looking after the house does not satisfy the requirements of s. 76(5) because putting in furniture does not amount to "substantially improving" the house itself. Implicit in his submission is also a contention that the trial Judge should not have given credence to the wife's evidence that during the marriage the husband had hinted that upon his death half of the house would be hers and the other half would be given to his sons.

The trial Judge's approach to this problem was to say that the house is not a home and that the general conduct of the wife throughout the marriage in addition to the purchase of the furniture made the house a home and this came within the definition "substantial improvement". We think there was more to it than that. The wife stated that throughout the 18 years of marriage she had to use substantial sums of her own money to run the house and family and that she expected a half share of the house because of the many years of the marriage and the contribution she made to the family and the house, being only the matrimonial home.

I would with respect adopt with approval the liberal approach taken by Thean J in *Shirley Koo v. Kenneth Mok Kong Chua* [1989] 2 MLJ 264 where the purchase by the wife of kitchen cabinets, crockery, pots and pans and

the payment of servant's salary, food in grocery bills were all added up as her contribution to a semi-detached terrace house which the husband claimed he had solely acquired because he alone had paid for it. From the time she began to live in it the wife in our case kept the house, and maintained and serviced it as a going concern. Its value appreciated from RM29,000 to RM175,000 partly as a result of her efforts also.

Mr. Sidhu contended that s. 76(3) of the Act did not operate to make this a matrimonial asset because the husband had bought the house before the marriage. He said it was therefore not an "asset acquired **during** the marriage". We think this interpretation is too narrow.

Once the house became the matrimonial home, its increase in value for the duration of the marriage is an asset acquired by their joint efforts. RM175,000 less RM29,00 is RM146,000 and had she got a half-share of this as she claimed she stood to get RM73,000. The Judge gave her a third of RM175,000 or RM58,333.

The Wife's House in Subang Jaya

It was further urged by the husband's Counsel that if the wife was to be given a one-third share in the matrimonial home, the husband should likewise be given a share in the house which she had bought herself in Subang Jaya. The basis of this claim was that the RM30,000 which she had paid towards this house came from the funds which the husband had provided during the marriage towards running of the house.

In this respect, we think that the husband was hoisted on his own petard. At best until the maintenance order was made by the Court on 26 August 1981, the husband's contribution did not exceed RM500 per month. This money would have been expended in the running of the household. If there were any savings, they would have come out of the wife's salary. The RM30,000 loan which the husband returned in 1989 was made up of some part of the wife's saving and partly from money the wife borrowed from her brother. We did not have any precise breakdown but we do know that it was a part of this RM30,000 which was used for the down payment together with about RM12,000 which she took out from her EPF. The husband made absolutely no contribution whatsoever towards the acquisition of this asset nor did he make any substantial improvement there. The house was bought in 1992 when the divorce had already been initiated. The spectre of having nowhere to go was exacerbated when the wife was unable to sustain the caveat which she had filed on the matrimonial home. As earlier indicated the powers of the Court under s. 52 and to order division of matrimonial assets under s. 76 is very flexible one. In all circumstances we think the trial Judge was under no obligation to hold that the husband had any share whatever in the wife's house.

We cannot but feel that the trial Judge's decision not to award any maintence to the wife was influenced very considerably by her award of one-third the value of the matrimonial home to the wife, and RM86,875 from the husband's EPF, but that was only payable when he reached 55.

Employees Provident Fund (EPF)

The decided cases show that EPF is a matrimonial asset. As at 31 December 1993 the EPF standing of the husband's credit was RM260,627.06. The wife had RM40,000 to her credit. The Judge directed that one-third of the husband's EPF be paid to the wife upon maturity. Counsel's submission before us is that this was manifestly unfair. Firstly; he said, since the husband was 34 years old when he married in 1974 it must have been the case that a part of his EPF would have accrued prior to the date of the marriage. Therefore, he said, this portion should be excluded. But the husband gave no evidence as to when he start working or how much EPF had accrued up to the date of the marriage.

The second submission was that since the parties had lived separately from 1990 there was no indirect contribution from the wife towards the stability of the marriage after that date. Therefore, he submitted that all contributions made after 1990 should not be taken into account for the purpose of the division. Therefore the total contributions for four years from 1990 to 1994 should have been deducted from RM260,627.06 leaving a gross figure of only RM190,547.06. He said that the wife's RM40,000 should be added to this making a total of RM230,547.06 out of which she should get one-third i.e. RM76,848.06 gross. From this, he said that since she was already in possession of her RM40,000, the balance should paid by the husband i.e. RM36,849.06.

This argument may be mathematically attractive but it totally ignored the fact that in September 1993 the husband withdrew RM106,000 from his EPF. If we follow the husband's approach the total amount of his EPF in 1993 should have RM366,627.06. If we add the wife's and gave her a one-third, the gross amount would have been RM135,542.06. Substracting her RM40,000, what she should have got was not RM86,875 which the trial Judge directed but RM95,542.06.

Conclusion

The arguments made before us by Mr. Sidhu were not raised in the Court below. Admittedly he was not then involved in this matter, but we must record with respect that his eloquence was an exercise in futility. The trial Judge was left to do her best with imprecise material. She took the broad approach and made her orders accordingly. Upon a careful reappraisal of all the material put before her we must place upon record our disappointment at how the

husband viewed his financial obligations to his wife and daughters. Had there been a cross-appeal we would have provided a reasonable amount for her maintenance or an increased share of the matrimonial home or both.

In the absence of a cross-appeal we must take the only course now open to us. The appeal is dismissed with costs to be taxed and paid both here and in the Court below by the husband to the wife.

He must therefore pay RM500 per month to each of his daughters and all their educational expenses until each of them has obtained their first university degree and also their medical bills. If the sum of RM58,333 has not already been paid to the wife, we direct the Senior Assistant Registrar of the High Court to have the house sold by private treaty or public auction and the wife be paid the said amount of RM58,333 as a first charge after the expenses of the sale. A further RM86,875 shall be paid to the her out of the husband's EPF when it is paid out in accordance with law.

Reported by W.A. Sharif